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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 FACEBOOK, INC.,
15 Plaintiff,
16 v.
17 POWER VENTURES, INC. a Cayman Island
corporation, STEVE VACHANI, an individual;
18 DOE 1, s/b/a POWER.COM, DOES 2-25,
inclusive,
19 Defendants.
20

Case No. 5:08-cv-05780-JW (JCS)

**FACEBOOK, INC.'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON COUNT 1**

Date: January 23, 2012
Time: 9:00 A.M.
Dept: Courtroom 9, 19th Floor
Judge: Hon. Chief Judge James Ware

21 **FILED UNDER SEAL**
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1 **I. INTRODUCTION**

2 Defendants violated 15 U.S.C. section 7704(a)(1). In its opening papers, Facebook
 3 demonstrated that Defendants violated the CAN-SPAM Act (“the Act”) by creating and initiating
 4 the transmission of at least 60,627 Facebook Event invitations with false and misleading header
 5 information. Defendants proffer no conflicting evidence. Instead, they argue that they could not
 6 have initiated the email notifications generated *after* they created the Events and selected the
 7 invitation recipients, because they did not control Facebook’s internal messaging systems. In so
 8 doing, Defendants ignore the legal definition of “initiator” under the Act. Defendants also ignore
 9 that their Event invitations qualify as unlawful messages under the Act. Because Defendants’
 10 arguments rest on faulty legal premises, summary judgment on Facebook’s CAN-SPAM claim is
 11 appropriate.

12 **II. ARGUMENT**

13 Pursuant to the CAN-SPAM Act, “[i]t is unlawful for any person to initiate the
 14 transmission, to a protected computer, of a commercial electronic mail message . . . that contains,
 15 or is accompanied by, header information that is materially false or materially misleading.” 15
 16 U.S.C. § 7704(a)(1). As discussed below, Defendants failed to create a genuine issue of material
 17 fact that their Event invitations are prohibited by section 7704(a)(1).

18 **A. Defendants Do Not Address Event Creation As An Independent Form Of**
 19 **SPAM**

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]. Nowhere in their Opposition do Defendants refute the evidence or Facebook’s
 23 argument that the Defendants initiated the Event invitations containing false or misleading header
 24 information. On that basis alone, summary judgment is warranted.

25 **B. Defendants Have Not Identified A Factual Dispute About The Harm**
 26 **Facebook Suffered**

27 Facebook was adversely affected by Defendants’ actions. Rather than challenge the
 28 evidence, Defendants incorrectly argue that the type of harm Facebook suffered cannot be used to

1 support its CAN-SPAM claim. Defendants' Opp'n to Facebook's Mot. for Partial Summ. J. on CAN-
 2 SPAM ("Defendants' Opp.") at 15:10-25. The undisputed evidence shows precisely the type of
 3 harm contemplated by the law. In its opening papers, Facebook detailed the time and resources it
 4 dedicated to combating Defendants' harvesting and spam campaign. 11/14/11 Mot. for Partial
 5 Summ. J. on CAN-SPAM at 11:1-12:7; 11/14/11 Decl. of Ryan McGeehan in Support of Mot. for
 6 Partial Summ. J. on CAN-SPAM ("McGeehan Decl.") at ¶¶ 6(a)-(d); 10-17; 11/14/11 Decl. of
 7 Joseph Cutler in Support of Mot. for Partial Summ. J. on CAN-SPAM at ¶¶ 6-15. This type of
 8 trouble and expense qualifies as the type of harm that "adversely affects" under the Act. *See*
 9 *MySpace v. Wallace*, No. CV-07-1929ABCAGRX, 2007 WL 2188109 *2 (C.D. Cal. Jul. 20,
 10 2007) (stating time, money, resources used to stop harm is sufficient to satisfy "adversely
 11 affected" standard).

12 Defendants rely exclusively upon the Deposition of Craig Clark, a Facebook employee,
 13 when he testified that he was not aware "of any document concerning any injury that Facebook
 14 suffered." Defendants' Opp. at 14:13-17. His lack of knowledge "of any document" is
 15 unsurprising. Mr. Clark started working at Facebook after the events underlying this dispute.
 16 12/2/11 Decl. of Theresa A. Sutton in Support of Facebook's Opp'n to Defendants' Mot. for
 17 Summ. J. ("Sutton Decl."), Ex. 3 at 7:5-6; 81:8-18. Further, Mr. Clark was deposed only in his
 18 individual capacity because he had verified certain interrogatory responses. Decl. of I. Neel
 19 Chatterjee in Support of Facebook's Reply Mem. ("Chatterjee Decl.") Ex. 5. None of those
 20 interrogatories sought information about the harm Facebook suffered as a result of Defendants'
 21 spamming activities. *Id.* Ex. 6.

22 **C. Defendants Do Not Identify A Factual Dispute As To Their Liability Under 15**
 23 **USC 7704(a)(1)(A)**

24 Defendants next argue that they did not initiate "email messages" and did not procure
 25 anyone to send the "email messages." Defendants' Opp. at 5:15-11:18. Defendants' argument rests on
 26 an erroneous legal interpretation of the word "initiate."

27 The Act has a clear and unambiguous definition of the phrase "initiate":
 28

1 The term “initiate,” when used with respect to a commercial
 2 electronic mail message, means to originate or transmit such
 3 message or to procure the origination or transmission of such
 4 message, but shall not include actions that constitute routine
 5 conveyance of such message. For purposes of this paragraph, more
 6 than one person may be considered to have initiated a message.

7 15 U.S.C. § 7702(9). The undisputed evidence shows that Defendants initiated the commercial
 8 messages. Specifically, Facebook has established that [REDACTED]
 9 [REDACTED]

10 [REDACTED]. 11/14/11 Mot. for Partial Summ. J. on CAN-SPAM at 12:16-14:8. Facebook
 11 also has demonstrated that Defendants offered money to their users to invite Facebook users to
 12 join power.com. Defendants do not dispute any of these facts.

13 **1. Defendants Concede They Initiated Transmission of Electronic Mail**
 14 **Messages**

15 Rather than challenge Facebook’s evidence related to Event creation and the sending of
 16 Event invitations directly on Facebook, Defendants misleadingly focus the Court on the email
 17 messages depicted in the First Amended Complaint. They then argue that those emails were
 18 “initiated” by Facebook. However, Defendants *caused* the messages to be sent. The email
 19 messages simply would not have been sent but for Defendants’ actions. Specifically, [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 [REDACTED] *See Melling Declaration*
 23 at ¶¶ 17-35. [REDACTED] [REDACTED]. *Id.* ¶¶ 22-26.

24 Once again, Defendants return to Mr. Clark to try to disclaim their responsibility. The
 25 entirety of the excerpt from Mr. Clark’s deposition to which Defendants cite shows nothing more
 26 than that the Facebook system generated email notifications in response to Defendants’ creation
 27 and transmission, through their software application, of the Event invitations. Defs.’ Opp. at
 28 8:13-10:21. Defendants’ recitation of Mr. Clark’s testimony does not create a factual dispute, but
 instead demonstrates Defendants’ liability set forth in Facebook’s moving papers: the email
 notification is “[a]utomatically generated by Facebook’s computers or their systems, based on a

1 prompt from somebody outside. . . . whoever's creating the event," which in this case is
 2 Defendants. 11/14/11 Mot. for Partial Summ. J. on CAN-SPAM at 15:19-28 citing Melling
 3 Declaration ¶¶ 3, 17-30; *see also* Defendants' Opp. at 9:1-4.

4 **2. Defendants Procured Initiation Of Transmission By Offering Its Users**
 5 **Monetary Incentives**

6 Defendants incorrectly argue that they are not liable under a "procurement theory"
 7 because Power did not pay *Facebook* to transmit any email. Defendants' Opp. at 11:16-17.
 8 Defendants again misread the law and attempt to bury the point: Their Launch Promotion was
 9 designed to pay *Power users* to implement their software, which automatically created and sent
 10 commercial messages to Facebook users encouraging them to join power.com. Even Vachani
 11 admitted that Defendants offered to pay (and, indeed, paid) their users to solicit Facebook users to
 12 join power.com. 11/14/11 Mot. for Partial Summ. J. on CAN-SPAM at 13:18-14:2; *see also* Dkt.
 13 Nos. 9 at ¶¶ 65, 70, 72; 54 ¶¶ 65, 70, 72; 11/14/11 Decl. of Monte M.F. Cooper in Support of
 14 Mot. for Partial Summ. J. on CAN-SPAM ("Cooper Decl.") Ex. 2 at 197:9-12; 203:19-204:7;
 15 212:19-213:4; 256:8-257:10; 257:22-258:11; 259:20-260:1; 261:23-262:5; 263:14-264:12; 266:7-
 16 21; 273:6-274:10. Defendants' refusal to acknowledge the basis of Facebook's motion does not
 17 create a factual issue. Rather, it demonstrates that Defendants cannot dispute that they violated
 18 the Act.

19 **3. Defendants Do Not Dispute That The Messages Were Commercial**
 20 **Electronic Mail Messages**

21 Defendants do not dispute, and thus admit, that the Event invitation and subsequent emails
 22 are commercial messages under the Act. 15 U.S.C. §7702(2)(A); 11/14/11 Mot. for Partial
 23 Summ. J. on CAN-SPAM at 14:10-15:3.

24 **4. Defendants Do Not Identify A Factual Dispute About Whether Their**
 25 **Messages Contained False And Misleading Headers**

26 No factual dispute exists as to whether the Event invitation headers were false and
 27 misleading. Facebook has demonstrated that Defendants' [REDACTED]
 28 [REDACTED]

1 [REDACTED]

2 11/14/11 Mot. for Partial Summ. J. on CAN-SPAM at 15:19-22; Melling Decl. at ¶¶ 3, 17-30.

3 Defendants do not dispute this fact. Instead, Defendants recognized the problem, as demonstrated

4 by previously withheld documents. In discussing the Launch Promotion Felipe Herrera, a Power

5 employee, told Mr. Vachani, “Jesus Christ, man . . . I had no idea we were sending these

6 messages and signing ‘The Facebook Team.’” He then continued, “Granted that signing someone

7 else’s name in a commercial email is just obvious to any layman that it is fraud. People don’t

8 need to be lawyers to know that it is wrong, so I don’t understand why we did this . . .”

9 Chatterjee Decl., Ex. 7.

10 Despite Power’s own statements, Defendants now erroneously argue that their messages

11 were not misleading because they received no complaints, and Mr. Clark could identify none.

12 Defendants’ Opp. at 12:16-13:23. It is enough that the header is, in fact, false and misleading

13 because it appears to have originated with the Facebook user, when it was actually created and

14 transmitted by Defendants. *See Aitken v. Commc’ns Workers of America*, 496 F. Supp. 2d 653,

15 667 (E.D. Va. 2007) (finding header information that appears to originate from a manager rather

16 than an “outsider” misleading because it could have more credibility and, therefore, affect an

17 objective recipient’s opinion about the message); *see* 15 U.S.C. §§ 7702(8); 7704(a)(1)(C).

18 Mr. Herrera’s email recognizes, and Defendants cannot dispute, this fact. Indeed, Defendants do

19 not dispute this fact.

20 **D. Defendants Do Not Dispute That They Knowingly And Willfully Violated The**

21 **Act**

22 Defendants incorrectly argue that Facebook seeks treble damages because they [REDACTED]

23 [REDACTED] Defs.’ Opp. at 16:1-4. In its motion, Facebook

24 explained that [REDACTED]

25 [REDACTED]

26 [REDACTED] 11/14/11

27 Mot. for Partial Summ. J. on CAN-SPAM at 16:8-13 (italics in original). Facebook’s motion

28 describes in detail how Defendants’ circumvention processes constitute knowing, willful and

1 aggravated violations of the Act. *Id.* at 16:24-17:1. Defendants offer no facts in response.

2 [REDACTED]

3 [REDACTED]. *Id.* at 17:3-26. Instead, they argue that they “did not harvest login
4 data for the purpose of sending unsolicited commercial messages.” Defs.’ Opp. at 16:26. Their
5 assertion lacks any evidentiary support. Indeed, Defendants admit they used the harvested
6 addressing information from Facebook to send their messages. Cooper Decl. Ex. 6 at Power’s
7 Responses to Requests for Admissions Nos. 15, 18, 22, 37, 43-44, 50, 54-56; Ex. 2 at 182:16-
8 186:2; 191:5-192:18; 197:4-8; 199:10-15; 203:4-18; *see also* 11/14/11 Mot. for Partial Summ. J.
9 on CAN-SPAM at 17:11-20 citing Melling Decl. ¶ 19. Defendants do not proffer any
10 contradictory evidence and do not explain why they now depart from their own prior discovery
11 responses.

12 Defendants seek to avoid treble damages by offering the self-serving conclusion that the
13 [REDACTED]

14 [REDACTED]” Defs.’ Opp. at 16:8-15.
15 Notably, Defendants do not dispute that [REDACTED]
16 [REDACTED]

17 [REDACTED] Melling Decl. ¶ 33. The latter information, of course, is highly critical to Facebook’s
18 ability to establish damages based on “[REDACTED]

19 [REDACTED] Because Defendants were, at best, reckless in permitting this
20 information to be destroyed, Facebook’s ability to prove damages now is inhibited.

21 E. **Vachani Does Not Dispute That He Is Independently Liable Under The CAN-**
22 **SPAM Act**

23 As with many of Facebook’s other arguments, Defendants concede – by failing to address
24 – that Vachani is individually liable under the CAN-SPAM Act. 11/14/11 Mot. for Partial Summ.
25 J. on CAN-SPAM at 18:2-16.

26 III. **CONCLUSION**

27 For the reasons stated above, as well as in Facebook’s opening brief and supporting
28 declarations, Facebook respectfully requests that the Court grant its Motion for Partial Summary

1 Judgment on Count 1.

2

3 Dated: December 12, 2011

Orrick, Herrington & Sutcliffe LLP

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5 By: /s/

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Defendant

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